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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ERICK RAMIREZ,

Defendant and Appellant.

B209764

(Los Angeles County
Super. Ct. No. BA325107)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig E. Veals, Judge. Affirmed as modified and remanded with directions.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Erick Ramirez appeals from the judgment entered following a jury trial in which he was convicted of attempted murder and assault with a deadly weapon. He contends photographs of the victim's injury should not have been admitted into evidence, he should have been granted a continuance to call a medical expert to discuss the photographs, the evidence was insufficient to support the convictions, and his assault sentence should be stayed because the assault conviction merges with the attempted murder conviction. We affirm with directions.

BACKGROUND

On the evening of July 1, 2007, Ramirez and three other men were sitting in a car in the parking lot of a 7-Eleven. When Henry Carpio and Esau Duran exited the 7-Eleven, the four men exited the car. One of the men started arguing with Duran and another broke a bottle over Duran's head. Both dragged Duran around the parking lot and beat him. Ramirez approached Carpio with something in his hand and cut him severely across the neck with it. After police officers arrived, Carpio left the scene and was eventually driven to the hospital by a cousin, where he received medical care from Dr. Christopher Ng. Dr. Ng took photographs of the injury. He opined that Carpio's wound was caused by an "edged device or tool, such as a knife."

Carpio testified at trial and a videotape of some of the incident was played for the jury. After being instructed on Ramirez's self defense, heat of passion and provocation defenses, the jury found Ramirez guilty of attempted murder and assault with a deadly weapon. The court sentenced Ramirez to life with the possibility of parole on the attempted murder count plus a concurrent three year term on the assault count.

DISCUSSION

1. Admission of Dr. Ng's photographs and refusal to grant a continuance

The prosecution did not turn over Dr. Ng's photographs until the day jury selection began, explaining that it had mistakenly subpoenaed the wrong physician and had only just learned Dr. Ng was the treating physician and had photographs. Defense counsel objected to admission of the photographs and Dr. Ng's opinion regarding Carpio's injury. The trial court found the photographs to be highly relevant and not unduly prejudicial. Defense counsel then requested a continuance to retain a rebutting medical expert. The court instructed counsel to find an expert during the People's presentation, and if one could not be retained in that time the court would entertain further discussion on the issue. Counsel did not retain an expert or renew the request for a continuance.

Ramirez contends the People failed to comply with their discovery obligations by delaying disclosure of the photographs and Dr. Ng's conclusion that a knife inflicted Carpio's wound. Though he does not contend the prosecution committed intentional misconduct, he argues its investigation was sloppy, ineffective and inefficient, and no good reason exists for failing to discover Dr. Ng's identity and the photographs prior to trial. He argues the trial court should have excluded the photographs as a discovery sanction or at least granted a continuance to permit him to call a medical expert to rebut Dr. Ng's opinion. Alternatively, Ramirez argues the photographs were unduly prejudicial and inflammatory. The arguments are meritless.

Penal Code Section 1054 et seq. governs discovery in criminal cases. The prosecution must disclose to the defense "[a]ll relevant real evidence seized or obtained as part of the investigation of the offenses charged." (Pen. Code, § 1054.1, subd. (c); all further statutory references pertain to the Penal Code unless otherwise specified.) Disclosure must be made "at least 30 days prior to the trial" (§ 1054.7) if the material and information "is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies" (§ 1054.1). "If the

material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately” (§ 1054.7.)

“California courts long have interpreted the prosecutorial obligation to disclose relevant materials in the possession of the prosecution to include information ‘within the possession or control’ of the prosecution. [Citations.] In *Pitchess v. Superior Court* [(1974)] 11 Cal.3d 531, 535, we construed the scope of possession and control as encompassing information ‘reasonably accessible’ to the prosecution. . . . In *People v. Coyer* (1983) 142 Cal.App.3d 839, 843, the court described information subject to disclosure by the prosecution as that ‘readily available’ to the prosecution and not accessible to the defense.” (*In re Littlefield* (1993) 5 Cal.4th 122, 135; see *Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 160-170.) The prosecution is not generally required to interview potential witnesses or gather evidence. (*People v. Hammond* (1994) 22 Cal.App.4th 1611, 1623.)

We review trial court discovery rulings for abuse of discretion. (*People v. Superior Court (Baez)* (2000) 79 Cal.App.4th 1177, 1185-1187.)

Ramirez does not contend, and the record does not disclose, that the People willfully failed to interview Dr. Ng and obtain the emergency room photographs. On the contrary, the court found the photographs were “clearly not in the People’s possession. . . . [They’re] something that the doctor had in his possession. The People were not aware of [them]. [They were] subject to being discovered by either side up until a trial began, and up until today for that matter, and the People have proceeded in that respect.” The prosecution, which had no duty to discover Dr. Ng’s identity or photographs, both of which were equally discoverable by the defense, disclosed all material information to defense counsel immediately upon obtaining it. It therefore committed no discovery violation and the trial court did not err in refusing to order a discovery sanction.

Even had the prosecution violated its discovery obligations, Ramirez makes no showing of prejudice. Violation of the reciprocal-discovery statute “is a basis for reversal only where it is reasonably probable . . . that the omission affected the trial result.”

(*People v. Zambrano* (2007) 41 Cal.4th 1082, 1135, fn. 13, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421.)

Ramirez argues belated revelation of Dr. Ng's identity and opinion and admission of the belatedly discovered photographs deprived him of the opportunity to retain an expert to review the photographs and possibly rebut Dr. Ng's opinion. However, the only rebuttal Ramirez represents he could have offered is that Carpio was cut not by a knife but by something such as a corner of a door frame. Such information would have been immaterial. Whether Carpio was injured by a knife or something like a door frame, it is indisputable that the instrumentality was deadly. As the trial judge noted, "[W]hat is at issue [is] the great bodily injury component of this case. And to the extent that you would get another doctor to come in and say that it wasn't caused by a knife, but it was caused by something else as sharp, well who cares?"

Even had a continuance been necessary to obtain a material expert opinion, the record does not indicate Ramirez sought a continuance after his initial request, as he was invited by the trial court to do.

Ramirez argues the probative value of the photographs was substantially outweighed by their unduly prejudicial effect because two of them were enlarged two to three times, making the wound appear much larger than the actual injury and thus tending to inflame the jury. The argument is meritless.

"The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice" (Evid. Code, § 352.) "The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory. [Citations.] The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. [Citations.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 133-134.) "[A] court may admit even 'gruesome' photographs if the evidence is highly relevant to the issues raised by the facts" (*People v. Coleman* (1988) 46 Cal.3d 749, 776.)

Three photographs of Carpio's injury were admitted into evidence. The first showed an open laceration approximately two inches long, one inch wide and a quarter inch deep, centered on the front of his neck. The second showed the same view enlarged by a factor of approximately three, giving a little more detail. The third, also enlarged, showed the wound was closed with internal sutures.

The court did not abuse its discretion when it admitted the photographs. They were highly probative of the elements of the charged crimes, corroborated the victim's testimony, were not cumulative, and did not unduly consume time. (*People v. Farnam* (2002) 28 Cal.4th 107, 185-186; *People v. Cain* (1995) 10 Cal.4th 1, 29.) To the extent that the jury was likely to have an emotional reaction adverse to Ramirez because of the photographs, the jury was already likely to have such a reaction on the basis of Carpio's testimony concerning the details of the attack. That is, given the nature of the crime, it was inevitable that some risk of such a reaction would be present. Victim photographs are often disturbing. (*People v. Ramirez* (2006) 39 Cal.4th 398, 454 ["The photographs at issue here are gruesome because the charged offenses were gruesome, but they did no more than accurately portray the shocking nature of the crimes."]) A jury "cannot be shielded from an accurate depiction of the charged crimes that does not unnecessarily play upon the emotions of the jurors." (*Ibid.*) Ramirez's argument that the depiction of Carpio's wound was inflammatory due to enlargement is unpersuasive, as the enlarged photos are no more disturbing than the non-enlarged one. And to the minimal extent that they show more detail, they are also more accurate.

In view of the high probative value of the photographs, we cannot say that the trial court abused its discretion when it concluded that their probative value was not substantially outweighed by the risk of undue prejudice. We therefore reject Ramirez's argument that the trial court abused its discretion by overruling his objections to the photographs under Evidence Code section 352.

2. Sufficiency of the evidence

Ramirez argues the evidence is insufficient to sustain his conviction because this was a case of self defense, or at least of an unpremeditated response to an unexpected confrontation. We disagree.

“The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] ‘Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder. [Citations.]’” (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) “When undertaking such review, our opinion that the evidence could reasonably be reconciled with a finding of innocence or a lesser degree of crime does not warrant a reversal of the judgment. [Citation.]” (*People v. Hill* (1998) 17 Cal.4th 800, 849.)

Ramirez argues he attacked Carpio in the heat of passion or because of an honest belief in the need for self-defense. His arguments depend, however, on his oft-stated contention that Duran and Carpio were the aggressors. But Carpio testified at trial that Ramirez’s companions began beating Duran without provocation, hitting him over the head with a bottle and punching him while he was on the ground, and that Ramirez then approached him and slashed his throat for no apparent reason. Because the jury could have reasonably inferred that Ramirez was the aggressor, in reviewing his substantial evidence challenge we must presume he was the aggressor. His arguments concerning self-defense and heat of passion therefore fail. (See *People v. Szadziejewicz* (2008) 161 Cal.App.4th 823, 834 [“a defendant who—through his own wrongful conduct, such as

initiating a physical assault or committing a felony—has created circumstances under which his adversary’s attack or pursuit is legally justified may not invoke unreasonable self defense”].)

We conclude Ramirez’s convictions for attempted murder and assault with a deadly weapon are supported by substantial evidence.

3. The sentence on the assault conviction must be stayed

Ramirez argues his sentence on count 4 should be stayed because it violates the proscription of section 654 against multiple punishments for the same act. We agree.

“An act or omission that is punishable in different ways by different provisions of law” shall not “be punished under more than one provision.” (§ 654, subd. (a).) “Section 654 bars multiple punishment for separate offenses arising out of a single occurrence where all of the offenses were incident to one objective.” (*People v. Lewis* (2008) 43 Cal.4th 415, 519.) Respondent agrees that the assault in this case was indivisible from the attempted murder. Therefore, the sentence for assault must be stayed. (*Ibid.*)

DISPOSITION

The judgment is modified to provide for a single prison term of life with the possibility of parole. The sentence for the assault conviction is stayed. As so modified, the judgment is affirmed. The court is directed to prepare a new abstract of judgment reflecting this change and to forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.